1902, and accepted by the plaintiff in full settlement of all claims against him, and he thereupon became entitled to all the leases in the bill and proceedings mentioned.

We have reached a different conclusion, it follows that the decree of the court of law and chancery must be reversed, and the cause remanded for further proceedings to be had therein, not inconsistent with this opinion.

NOTE.—This is the first case decided under section 2858 of the Code. The cases cited in margin of the Code, and in the opinion, to which may be added the case of *Smith* v. *Chilton*, 84 Va. 840, were decided before this section went into effect. This section was taken substantially from the Civil Code of New York, and inserted into the Code of 1887, for the purpose of abolishing the common law doctrine that part payment (at the time and place where the whole was due) would never satisfy the whole, as there was no consideration for giving up the rest of the debt.

This case holds that the burden of proof is on the debtor to show that the part payment was "expressly accepted by his creditor in satisfaction, and rendered in pursuance of an agreement for that purpose." The decision is clearly right. The part payment here is a matter of defence, which should be set up by the debtor (defendant) by a plea of accord and satisfaction, alleging the accord or agreement, the satisfaction performed in pursuance of the accord, and the acceptance of the satisfaction as such; and, being so set up or pleaded by the debtor, the burden is on him to prove the matters alleged. G. C. G.

C. C. VAUGHAN & CO. v. VIRGINIA FIRE & MARINE INS. CO.*

Supreme Court of Appeals.

March 10, 1904.

INSURANCE—FRAUD—EVIDENCE.

1. Evidence in an action on a fire policy held insufficient to furnish an explanation, required of insured, of the presence of false invoices in the proofs of loss.

2. The unexplained presence of false invoices in the proofs of loss avoids the policy for fraud, though enough goods actually covered by the policy are burned to have authorized recovery of the full amount of insurance.

Error to Circuit Court, Greensville County.

Action by C. C. Vaughan & Co. against the Virginia Fire & Ma-

*Syllabi by West Publishing Company.

rine Insurance Company. Judgment for defendant. Plaintiffs bring error. *Affirmed.*

See 14 S. E. 754.

Davis & Davis, for plaintiffs in error.

Leake & Carter, for defendant in error.

BUCHANAN, *J.*:

This is the second time this case has been before this court. Upon the former writ of error, all questions of law involved in the case were settled, the verdict of the jury set aside because not sustained by the facts, and the cause remanded for a new trial. The proceedings had in the cause prior to that time are fully set out in the opinion of the court, and reported in 88 Va. 832-842, 14 S. E. 754.

After the case was remanded, a new trial was had, in which there was a verdict for the plaintiff. That verdict was set aside by the Circuit Court, and a new trial granted. Upon a new trial precisely the same evidence was introduced by the parties as was before the jury upon the last preceding trial. To that evidence the defendant demurred, which demurrer was sustained by the court, and a judgment rendered in favor of the defendant. To that judgment this writ of error was awarded.

As stated by the plaintiff in error in his petition, the only question for our determination is whether or not, under the rules applicable to a demurrer to evidence, it appears from the record that the plaintiff's claim has been forfeited under the provision of the policy that the company should not be liable thereunder for loss or damage, if there be "any false swearing or fraud, or attempt at fraud, before or after loss or damage by him [the assured] in support of his claim for loss or in proofs of loss hereinafter mentioned."

One of the defendant company's defenses was that Lassiter, the assured, and the assignor of the plaintiff, was guilty of false swearing and of an attempt at fraud, in furnishing preliminary proofs of loss.

A day or two after the fire, the adjuster of the company went to Franklin, Va., to adjust the loss. When he reached there, he was informed by Lassiter that all his books and papers, except an inventory taken about a month before, were lost. Lassiter made a statement of his loss, and was then requested to furnish the company

duplicate invoices for the bills which had been burned. This he agreed to do. Duplicate invoices were furnished, aggregating the sum of-$3,028.51, which were listed and afterwards sworn to by Lassiter. The evidence as to the circumstances under which and by whom the list was made out is conflicting, but, on a demurrer to the evidence, it must be treated as made out by the adjuster of the defendant company. It was forwarded to the solicitor of the company at Franklin, with the request that he get Lassiter to sign and swear to it, and return it to the company. This was done. The certificate appended to the list which Lassiter signed, and to which he made oath is as follows:

"I hereby certify that the duplicate invoices furnished as per above statement, amounting to three thousand and twenty eight 51-100 dollars, said invoices being in the names of M. L. Beale & Co., D. Lassiter & Co., and D. Lassiter, all of which form a part of my loss, are correct, and were received by me at Franklin, Va., and constituted the goods burned on the morning of December 6, 1888."

Among the duplicate invoices furnished, listed, and sworn to, are several bills for goods and items in other bills which the evidence conclusively shows did not constitute any part of the goods burned, but which had been so charged as to make it appear that they were a part thereof. One of these was a bill of goods sold to M. L. Beale, August 13, 1888, for $328.50. It was changed so as to make it appear that it was sold to "M. L. Beale & Co." on October 13, 1888. The members of the firm of M. L. Beale & Co. were M. L. Beale and D. Lassiter, and they did not go into business together until September 27, 1888. Their firm name was soon afterwards changed to D. Lassiter & Co., and on the 27th of October following the policy of insurance sued on was taken out in the name of D. Lassiter & Co. On the 12th of November, Beale withdrew from the firm, and on the 5th of December he assigned his interest in the policy to Lassiter. Beale, prior to and during the time he was in partnership with Lassiter at Franklin, was doing business in Courtland on his own account. The $328.50 worth of goods, as above stated, were sold to M. L. Beale on the 13th day of August, 1888, and shipped to him at Courtland.

Another of the invoices listed and sworn to was a bill for $171.39 for goods sold to D. Lassiter by Adelsdorf Bros. on the 18th day of September 1888. This bill was so changed as to make it appear

that the goods were sold to D. Lassiter & Co. on the 28th of September, 1888.

Another of the charged invoices was a bill of $14.40 for goods sold by the Norfolk Bottling Company in October and November, 1888. The goods were sold and shipped to M. L. Beale, Courtland, Va., and the bill, which was made out against "Mr. M. L. Beale" was changed to "Mess. M. L. Beale & Co." It further appeared that the Norfolk Bottling Company never had any account with M. L. Beale & Co.

Another of the invoices was for a bill of $134.93 for goods sold and shipped to M. L. Beale, Courtland, Va., on the 29th day of August, 1888, and which was so charged on the books of the seller, yet the bill was made out in the name of M. L. Beale & Co. by the bookkeeper at the request of some one—whom, he does not remember—and the date changed, after the bill was made out and delivered, from August 29 to October 21, 1888.

A business house in Petersburg had sold M. L. Beale & Co. on October 3, 1888, a bill of goods of the value of $59.40. Among the invoices listed and sworn to, there is a bill of the same date for $304.06, for goods sold to that concern. The evidence is clear that no such bill of goods was sold to that firm, or ever became a part of the stock of goods insured.

In another of the invoices—a small purchase made by Lassiter on the 6th of September, 1888—the date is changed to September 27 of that year, the day on which M. L. Beale & Co. commenced business.

It further appears that, the day after the list of duplicate invoices was signed and sworn to by Lassiter, he assigned the policy of insurance for $1,100—$400 less than its full amount.

Under these circumstances, as was said by this court upon the former writ of error, "it was undoubtedly incumbent upon the plaintiff, to entitle him to recover, to remove the suspicion which the facts proved in connection with the invoices in question justly excite, for nothing is better settled than that the assured must observe, in dealing with the insurer, the utmost good faith, without which there can be no recovery. *Moore* v. *Va. Fire & Marine Ins. Co.*, 28 Gratt. 508, 523 [26 Am. Rep. 373]." Because there was no such explanation offered on the first trial touching the false statements made under oath in furnishing the preliminary proofs of loss, the verdict of the jury was set aside and a new trial ordered.

An effort was made on the last trial to furnish such explanation by the examination of the solicitor of the company, who forwarded some, or perhaps all, of the duplicate invoices to the defendant company as they were furnished him by Lassiter, by showing that such invoices were not changed when he forwarded them to the company. But it is clear from the solicitor's evidence that he paid very little attention to those papers when they were handed him, and that he did not examine them with any such care as would enable him to say whether or not they were changed when he forwarded them to the company. Lassiter died before the last trial, but he was living at the date of the first trial, and did not testify, or attempt to explain at that time why or how the false and fraudulent duplicate invoices were furnished to the company. It is argued that Lassiter was not guilty of fraud, or an attempt to fraud, in furnishing proofs of his loss, because the goods destroyed, exclusive of the alleged fraudulent items, the proofs show, were worth more than $2,000, and that the plaintiff could in no case recover more than $1,500. This contention was fully answered by Judge Lewis, speaking for the court, upon the former writ of error, and need not be repeated, for, as was said then, "however that may be, the undisputed facts are that he swore to a loss in excess of the actual loss, and furnished false vouchers, for which no explanation has been offered. We must therefore infer that his sworn statements were known to him to be false, and, being upon a material matter, the law presumes that they were made with intent to deceive."

We are of opinion that the conclusion reached by the Circuit Court upon the demurrer to the evidence was plainly right, and its judgment should be affirmed.

Absent, CARDWELL, J.

NOTE.—The question before the court here was: Whether the swearing to false invoices, after a fire, for the purpose of increasing the amount of loss, forfeits a policy of insurance, under a provision in the policy that the company shall not be liable thereunder for loss or damage if there be "any false swearing or fraud or attempt at fraud before or after loss or damage by him [the insured] in support of his claim for loss or in proofs of loss?" The court held that it would. This was very proper under the facts of the case, for the false swearing and attempt at fraud constituted a breach of an express condition, and, as would be the case in the breach of any reasonable condition of a voluntary contract, caused a forfeiture.

The court, in this and in its previous decision in this case (88 Va. 832,

14 S. E. 754), put great emphasis upon the subject of fraud—so much so that the reader, unless he examines the case carefully, may be lead to think that the court held that the fraud alone, independently of the express condition, would have avoided the policy.

What would be the effect of fraud in the absence of such a condition in the policy? Fraud on the part of the insured at the time of making the contract of insurance would render it void (*Moore* v. *Va. F. & M. Ins. Co.*, 28 Gratt, 508, 523. *Burruss* v. *National Life Assn.*, 96 Va. 543, 548-9), it would seem that fraud in the proof of loss could not produce this result.

G. C. G.

SOUTHERN RY. CO. v. GLENN'S ADM'R; GLENN'S ADM'R v. SOUTHERN RY. CO.*

Supreme Court of Appeals.

March 10, 1904.

TRUSTEE—COMPENSATION—ILLEGAL ALLOWANCE—INTEREST—APPEAL—PARTIES—STATUTE—MANDATE—MISNOMER.

1. Where a mandate of the Supreme Court of Appeals provides that the directions to the lower court contained therein shall be so carried out as not to conflict with the written opinion of the court, and, through inadvertence, names the person affected thereby as W. W. Glenn, as appears from a reading of the written opinion, in which the correct name of the person affected is shown to be John Glenn, the action of the lower court in making the mandate operative against John Glenn is not an amendment, but a construction, of the mandate.
2. Where a recital in a mandate of the Supreme Court of Appeals of the name of a person affected thereby was unnecessary, an inadvertent misnomer therein of such person will not vitiate the mandate as to the person intended to be named—the correct name appearing in the written opinion in the cause—but the name will be treated as surplusage.
3. Under Code 1887, section 3454, declaring that any person who is a party to any case in chancery wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order, an appellant can only be one who is a party to the suit in the court below, and presents a petition for an appeal from such decree.
4. Where parties stand on distinct and unconnected grounds, their rights being separate and not equally affected by the same decree, the appeal of one on behalf of others will not bring up for adjudication the rights or claims of any but the one appellant.

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